



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *A. C. v Minister of Employment and Social Development*, 2019 SST 987

Tribunal File Number: AD-18-702

BETWEEN:

A. C.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Kate Sellar

DATE OF DECISION: September 16, 2019

DECISION AND REASONS

DECISION

[1] The appeal is allowed. The Appeal Division will give the decision that the General Division should have given: the Claimant is entitled to a disability pension under the *Canada Pension Plan (CPP)*.

OVERVIEW

[2] A. C. (Claimant) stopped working as a X in December 2015 and stated that she became disabled as of January 1, 2016. She has chronic pain in her knees, back, hips, shoulders, and neck, and arthritis in her hips, back, and knees. Her medical reports also state that she has chronic obstructive pulmonary disease (COPD), sleep apnea, type 2 diabetes, and functional dyspepsia. She has also been treated for depression. She tried to return to work in September 2017 as a X. The job also involved cleaning. She worked full-time hours and found after a month that she could not continue.

[3] The Claimant applied for a disability pension under the CPP in June 2016. The Minister denied the application initially and on reconsideration. The Claimant appealed to this Tribunal. The General Division dismissed her appeal on July 30, 2018.

[4] The parties agree that the General Division made errors of law. In an earlier decision, I found that the General Division made the errors set out in the agreement between the parties. I stated that, in a separate decision, I would give the decision that the General Division should have given.

[5] I find that the Claimant is entitled to a Canada Pension Plan disability pension. She has proven she was disabled beginning in January 2016.

PRELIMINARY MATTER

[6] The Claimant provided a document called "Client Communication Record," which was not available to the General Division when the General Division made its decision. The Claimant

also provided a series of medical reports dated from June 2017 to November 2017, a consultation report from December 2017, and more reports from February 2018 through to May 2018.¹

[7] The Appeal Division does not hear new evidence, although there are some limited exceptions to that rule.² None of the exceptions to the rule apply here. I will not consider any of this new evidence that was not already available to the General Division.

ISSUE

[8] Has the Claimant shown that she had a severe and prolonged disability at or before the end of her minimum qualifying period?

ANALYSIS

Proving a Disability Is “Severe”

[9] To get a disability pension under the CPP, claimants must have a severe and prolonged disability at or before the end of the minimum qualifying period (MQP). The Minister calculates the MQP based on contributions to the Canada Pension Plan.

[10] Claimants have to show that it is more likely than not (also called proving on a “balance of probabilities”) that they have a disability. Claimants must have some objective medical evidence to support their claim for the disability pension.³ When assessing whether a disability is severe, the Tribunal must take into account all of the impairments, not just the biggest impairment or the main impairment. The Tribunal must consider the cumulative impact of the conditions on the claimant’s capacity to work.⁴

[11] In assessing whether a disability is severe, the General Division must take a real-world approach, which means considering whether claimants are employable in light of their backgrounds and medical conditions. This includes considering aspects of claimants’ personal

¹ See the new documents in AD14.

² That idea is explained in a case called *Parchment v Canada (Attorney General)*, 2017 FC 354.

³ That idea is explained in a case called *Canada (Attorney General) v Warren*, 2012 FCA 74.

⁴ That idea is explained in a case called *Bungay v Canada (Attorney General)*, 2011 FCA 47.

circumstances like their age, education level, language proficiency, and past work and life experiences.⁵

Has the Claimant shown that she had a severe and prolonged disability at or before the end of her minimum qualifying period?

[12] The Claimant has shown that she is entitled to a disability pension under the CPP. She had a severe and prolonged disability within the meaning of the CPP as of January 2016 when she was no longer working and her business was closed.⁶

[13] I find that the Claimant has a serious medical condition. Her main disabling conditions are mechanical back pain and myofascial pain syndrome. She has some other conditions that are managed (like type 2 diabetes) that she did not focus on in terms of the functional limitations that would impact her ability to work.

[14] Taking into account the Claimant's functional limitations, personal circumstances, and treatment, I find that the Claimant did not have even a residual capacity to work at or before the end of her MQP. As a result, she does not need to show that efforts to obtain and maintain employment were unsuccessful by reason of her health condition.

[15] The Claimant testified that her disability started on January 1, 2016. The Claimant testified that, other than the failed work attempt as a X in 2017, she selected this date because that was when she could no longer work. While it is true that she was locked out of her X in December 2015, I accept her evidence that showed she was struggling to work due to her disability and that she was considering selling the business anyway. I accept her evidence that she did not go work in another X because she did not believe she would be able to do so.

⁵ That idea is explained in a case called *Villani v Canada (Attorney General)*, 2001 FCA 248.

⁶ The Claimant's MQP ended on December 31, 2016.⁶ However, because the Claimant earned some money in 2017, if she was not disabled before the end of her MQP, she can still qualify for the disability pension if she was disabled between January 1, 2017 and March 31, 2017. That period in 2017 is sometimes called the "period of proration."

Evidence About the Claimant's Diagnoses and Functional Limitations

[16] The Claimant has several diagnoses. The Claimant says she has myofascial pain syndrome,⁷ mechanical back pain, degenerative disc disease with facet osteoarthritis, osteoarthritis in her left knee, and bursitis in her left hip. Her medical reports also state that she has COPD, sleep apnea, type 2 diabetes, and functional dyspepsia.

[17] Not all of the Claimant's conditions impact her ability to work. The Claimant's own evidence about her limitations focuses mostly on the pain she experiences, especially the pain in her back, knee, and legs. The Minister argues (and I accept) that the Claimant's functional dyspepsia is controlled and that her type 2 diabetes is controlled by diet and medication.⁸ I accept the evidence that the Claimant uses a continuous positive airway pressure machine at night to manage her sleep apnea.⁹ I have focussed my attention on the functional limitations connected to the Claimant's pain.

Claimant's Descriptions of her Limitations

[18] The Claimant described the limitations that she experiences because of her pain. In the Canada Pension Plan Questionnaire, the Claimant explained that she can sit for 30 minutes and stand for 10 minutes. This represents limited sitting and standing abilities. She stated that she can walk about 100 metres but that she stops halfway to wait for spasms to stop before completing the walk. She explained that she could not lift her grandson when he was only 10 pounds. She stated that she is limited in terms of her ability to reach for things and that bending causes a lot of pain and discomfort. She described being able to do about a quarter of what she used to be able to do in term of household maintenance. Tasks take her longer than they used to, and she relies on others for help.

[19] The Claimant explained the ways she tried to manage working despite her pain. She tried to open her own X. The Claimant testified that the idea was that, if she was in pain, she would be

⁷ This was described as myofascial pain syndrome/fibromyalgia as early as 2005; see Dr. Mosewich's consultation report at GD2-127.

⁸ The Claimant's doctor confirmed that the diabetes is controlled in the Canada Pension Plan Medical Report at GD2-128.

⁹ GD2-161.

able to cancel her appointments and that eventually she would have X working for her. She would have control over her schedule and be able to avoid the kind of scheduling problems she had when she worked as a X in other X (for example, avoiding “back-to-back” appointments). However, the Claimant testified that her clients started to go to other X. The Claimant testified that she hired one X but that did not work out, and a second one worked part-time but was only able to work with her for a while.

[20] The Claimant had to leave her town to take care of a family issue, and when she returned, the landlord had locked her out of her business. The Claimant testified and I accept that, before she was locked out of the business, she was working long hours and she had talked about trying to sell the business. I accept the Claimant’s evidence that she had an appointment with a realtor to discuss the sale of the business for December 12, 2015.¹⁰

[21] I accept the Claimant’s evidence that, while operating her own X, she could not stand for any length of time, that she would “seize up” if she sat down, that raising her arms was causing pain in her neck and shoulders, and that she relied on family members and a friend to help her with basic cleaning chores.

[22] In her testimony at the General Division, the Claimant explained that she was using a cane in 2015. The Claimant gave evidence at the hearing about attending the emergency department (with acute pain) between October 2015 and January 2016 when she stopped working. She described the pain and swelling she experienced when she worked and that she had to cancel appointments because of her pain. She described the fact that even reaching for a small item can cause a flare-up in her pain.

[23] In her reconsideration letter that the Minister received in November 2016, the Claimant states, “[t]here are many times that my knees will swell or just give out, and I can not walk or stand. I use a cane regularly to ease the weight load on my body.”¹¹

[24] At the hearing, the Claimant explained that it was a challenge to sit even long enough to complete her request for reconsideration that she sent to the Minister after the Minister denied

¹⁰ GD2-29.

¹¹ GD2-28.

her application. The Claimant testified that, in 2016 (after she stopped working), her medication to address her pain was not working and it was a “mission” to walk to her mailbox.

[25] At the General Division hearing (long after the end of the period of proration), after about an hour, the Claimant asked whether she could stand up. She stated that she was squirming and explained in her own words that she was in pain. The Claimant testified that sitting through the hearing was “really hard” but that she had taken medication right before she attended.

[26] At the General Division hearing, the Claimant explained that her depression also impacted her ability to work in the sense that there were times when she felt worthless because there was so little physically that she could do.

[27] I accept the Claimant’s evidence as she provided it to the General Division and in her Canada Pension Plan questionnaire. I do not identify inconsistencies in or problems with her testimony about the impact that her pain has had on her ability to sit, stand, walk, lift, reach, and bend since she stopped working at the end of 2015. The Claimant’s evidence shows that, by the time her X closed in December 2015, she was having trouble coping with work as a result of her pain. She was cancelling appointments and losing clients, and she had a plan to try to sell the business.

Medical Documents

[28] The Claimant’s file includes medical reports from many years before the end of the MQP. For example, in 2004, Dr. Faridi noted that the Claimant has myofascial back pain and sciatic type pain and that she had multiple occasions when her legs gave out.¹² Dr. Mosewich evaluated the Claimant’s back pain in 2005 and gave the Claimant a cortisone block.¹³ Dr. Faridi, a neurosurgeon, assessed the Claimant’s back pain as well and, in 2011, the Claimant had a facet rhizotomy.¹⁴

[29] There are also some key medical reports that describe the Claimant’s limitations during the MQP and after the end of the MQP (during the period of proration). Dr. Newmarch

¹² GD12-25.

¹³ GD2-126 to 127.

¹⁴ GD2-138 to 140: report from Dr. Faridi; GD2-141 to 142: operative report.

completed the Canada Pension Plan medical report.¹⁵ The report states that the Claimant had chronic back pain secondary to degenerative disc disease and that it persisted despite the 2011 rhizotomy. He stated that her ability to walk and to perform her activities of daily living was impaired due to pain that radiated from her back to her left leg. Dr. Newmarch referred the Claimant to a pain clinic. The Canada Pension Plan medical reports lists medications that the Claimant was taking, including medication that lowers cholesterol, one that controls high blood sugar, and an opioid to address moderate to severe pain. The Claimant's prognosis for her back pain was guarded.

[30] Dr. De Villiers, a pain specialist, provided an evaluation of the Claimant for her family doctor in October 2016 (just before the end of the MQP).¹⁶ He listed the Claimant's problems as obesity with deconditioning, myofascial pain, mechanical back pain (multifactorial with no radiculopathy), and left knee pain.

[31] After the end of the MQP but during the period of proration (in February 2017), Dr. Newmarch wrote to Service Canada.¹⁷ He stated that the Claimant had chronic low back pain with no indication for surgical intervention. He noted the following about the Claimant:

She is now off all narcotic pain medication and taking only Cymbalta for chronic pain and depression. She is overweight and deconditioned but could cope with part-time work that did not involve any lifting. This patient's chronic back pain flares with minimal physical activity and she does not tolerate prolonged sitting.

[32] The Minister argues that this report from Dr. Newmarch is evidence that the Claimant had capacity to work in a part-time position. The Claimant argues that she is incapable regularly of any substantially gainful occupation and that Dr. Newmarch's report does not address how regular her incapacity was at the time of her MQP.

[33] The medical evidence leads me to several conclusions. First, the medical reports meet the standard for "some" objective evidence that the Claimant needs to establish that she has a severe and prolonged disability. The reports dating back to 2005 are consistent with the Claimant's

¹⁵ That report is at GD2-128 to 131.

¹⁶ This evaluation is at GD2-108 to 110.

¹⁷ This letter is at GD2-103.

evidence that she experiences back pain and that her functional limitations did not decrease in severity after the 2011 rhizotomy. Second, the pain she experiences was serious enough to warrant the use of opioid medication to address the pain and a referral to a pain specialist.

[34] Third, the only assessment from a physician of the Claimant's capacity for work comes from Dr. Newmarch. However, Dr. Newmarch's letter cannot form the basis for a conclusion that the Claimant had capacity for work. His opinion is dated in February 2017, during the period of proration, long after the Claimant stopped working at her X. Dr. Newmarch's report is somewhat contradictory. He clearly states that the Claimant has some capacity to do part-time work that does not involve lifting. However, he also identifies several functional limitations that, in my opinion, mean that the Claimant is incapable regularly of pursuing any substantially gainful occupation. Dr. Newmarch states that the Claimant's back pain flares with "minimal activity" and that she does not tolerate prolonged sitting.

[35] I find that if Dr. Newmarch's opinion shows any capacity for work, it is for part-time work in which the Claimant is not sitting for prolonged periods and is not doing even "minimal" activity. Having residual capacity for work that does not involve either prolonged sitting or even minimal activity seems not to be residual capacity at all. It is difficult to say, in a real-world way, that there is a part-time job that would be substantially gainful and does not involve even minimal activity and prolonged sitting.

[36] The Claimant also stated in her request for reconsideration, "After several months of seeing Dr. Newmarch regularly, he explained to me that returning to work was not an option for me. In June he signed the [Canada Pension Plan] disability application."¹⁸ In my view, none of the medical evidence or the testimony from the Claimant shows a residual capacity to work as of January 1, 2016.

Treatment

¹⁸ GD2-30.

[37] Claimants must show that they have taken reasonable steps to manage their medical conditions.¹⁹ If claimants refuse treatment unreasonably (the impact of the refused treatment on the disability is also relevant), they may not be entitled to the disability pension.²⁰

[38] When the Claimant saw Dr. De Villiers (the pain specialist), his treatment plan was divided into four categories.²¹ For pain education, he referred the Claimant to a website. For active rehabilitation, he stated that she had to find an activity that she could do, find her baseline ability, and gradually increase from here. He stated that she might benefit from seeing a kinesiologist to help her. For medication, he prescribed Cymbalta, stating that she “may” get a 30% reduction in pain with that medication. He also stated that, if he could decrease her pain, they could look at injections.

[39] The Minister argues that the Claimant made minimal effort to follow the treatment recommended by her doctors. The Minister argues that the Claimant did not exercise regularly or lose weight. The Minister argues that the Claimant made only a “ cursory review ” of the pain management website before deciding that she could not afford it.

[40] I do not accept the Minister’s argument. I find that (a) the record shows that the Claimant took reasonable steps to manage her medical conditions; and (b) to the extent that she refused to pay for the online pain education program, I find that refusal was reasonable.

a) The claimant took reasonable steps to manage her conditions

[41] The record is clear that the Claimant tried many other treatments to address her pain and her depression. In 2011, the Claimant agreed to a rhizotomy even though the doctor advised that the prognosis of treatment for chronic pain is poor. The rhizotomy did not address her pain.

[42] By January 2016, she was no longer working. She was on hydromorphone for her pain. The record shows she has tried to manage her pain with prescribed medications and has agreed to medication changes when her doctors recommended them. She continues on recommended medications to this day. The evidence at the hearing was that the Claimant was no longer taking

¹⁹ *Sharma v Canada (Attorney General)*, 2018 FCA 48.

²⁰ *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

²¹ GD2-109 to 110.

medication for depression. She testified at the hearing that she did try a year of counselling. However, I find that the main functional limitations that impact her ability to work stem from her pain, rather than her depression.

[43] The Claimant testified that she does some exercise, including stretching and bending at home, as well as walking. The Claimant testified and I accept that the Claimant tried to lose weight. She testified that she attempted to eat healthier.

[44] The Claimant testified and the record reflects that the Claimant has tried physiotherapy, massage therapy, and chiropractic treatments but that she did not have much benefit from these treatments.

b) Refusing treatment due to cost was reasonable

[45] The Claimant testified that, when she attended the pain clinic, she did not follow through on the recommendation about following an online program. The Claimant testified that the cost of the online program was too high. The General Division member questioned the Claimant at length about the fact that the Claimant smoked and the relative cost of her unhealthy habit versus the online pain management program. However, the CPP does not require claimants to be perfect in terms of their following every treatment mentioned by a health professional.

[46] The CPP does not require people who want a disability pension to show that they have a completely healthy lifestyle: the focus is on functional limitations that impact capacity to work. The General Division had to consider whether the Claimant's explanation for refusing the online resource was reasonable.

[47] The General Division must consider the impact a treatment was likely to have on the claimant's disability. When a claimant's explanation for refusing treatment is unreasonable, a claimant may not get the disability pension (even if they otherwise meet the test in the CPP for a severe and prolonged disability). In other words, the stakes are high for claimants when the question of refusing treatment comes up.

[48] One explanation claimants raise for refusing a treatment can be the cost. In assessing whether this explanation is reasonable, the goal is not to require claimants to show that they have

followed a family budget that supports only healthy habits. It is not consistent with the purpose of the CPP to closely scrutinize the line items in a Claimant's personal budget or to require Claimants to manage their financial affairs in a particular way to show that their explanation for refusing treatment was reasonable.

[49] I find that the Claimant's explanation that she could not afford the online program is reasonable. The Claimant was self-employed, and the business was not going well when the pain clinic recommended the online program to her. She stopped working only a few months after she was referred to Dr. De Villiers. The Claimant testified that, when she was working, she was a single mother. After she stopped working, she lost her home (due to foreclosure). Her financial situation over the years has been a source of strain on her personally and on her relationship. The evidence was clear that the Claimant is a smoker. Nicotine is addictive. She has made multiple efforts to quit. The Claimant could not afford the online pain management program, so she did not follow through with that recommendation. In my view, the Claimant's explanation is reasonable based entirely on the information she provided about how little money she had. The fact that her family budget includes cigarettes for her does not mean that her explanation is unreasonable.

The Claimant's Personal Circumstances

[50] I must take a "real-world" approach to considering the severity of the Claimant's disability. That means that I must take into account the Claimant's personal circumstances, including her age, education level, language proficiency, and her past work and life experience.²²

[51] The Claimant was 50 years old in 2017. She has a Grade 12 level of education and a certification for X. She speaks and writes English without difficulty. Her work history includes jobs as X.

[52] In terms of her work history, the Claimant did attempt to return to work in September 2017 (after the end of the MQP) as a X. The job also included some light cleaning, and the hours quickly became full-time when initially they were supposed to be part-time. The Minister argues that the work the Claimant did as a X is evidence that she had a residual capacity to work. The

²² *Villani v Canada (Attorney General)*, 2001 FCA 248.

Minister points out that, while she did stop work after a month due to increased pain, some of the work was outside her physical limitations and went against her doctor's advice.

[53] I find that the X job was a failed work attempt and does not show that she had residual capacity to work during the MQP. The Claimant testified that the position was supposed to be two days per week. She tried the job because it was not supposed to involve lifting, but she agreed to work four days a week because the company was short-staffed. She testified that she had back pain while doing this job and that she was on medication and drowsy. She testified that she had trouble concentrating and that she was "screwing up" on the phones. Some aspects of the job (the light cleaning) appear to be outside of what the Claimant could do physically. However, I am not satisfied that there was any other work that she could have done at the time that was lighter and met her physical restrictions.

[54] In my view, the Claimant cannot return to the kinds of jobs she worked in the past due to functional limitations in terms of pain and her limited ability to sit and to stand. Her work history means that she does not have transferrable skills that would assist her to get new and different work that would meet her functional limitations. The Claimant's age and education do not mean that it would be impossible for her to retrain, but in the real world, it is not clear what type of position she could retrain for, given her limitations with sitting, standing, and even "minimal" activity.

The Claimant Has a Prolonged Disability

[55] The Claimant's disability is likely to be long continued and of indefinite duration. This means it is prolonged within the meaning of the CPP.²³

[56] The Claimant's back pain is the result of a traumatic childhood injury. Her back pain is certainly long continued.

[57] The Claimant's back pain is of indefinite duration. The CPP medical report referred to the Claimant's prognosis as "guarded." She has attempted multiple treatments and continues to have significant pain.

²³ *Canada Pension Plan*, s 42(2)

CONCLUSION

[58] The appeal is allowed. The Minister received the Claimant's application for a disability pension in June 2016. The Claimant proved she had a severe and prolonged disability when she applied for the disability pension in January 2016. Payments begin four months after the start of the disability,²⁴ which in this case means the Claimant's payments will begin effective May 2016.

Kate Sellar
Member, Appeal Division

METHOD OF PROCEEDING:	On the record
APPEARANCES:	Daniel Griffith, Representative for the Appellant Susan Johnstone, Representative for the Respondent

²⁴ *Canada Pension Plan*, s 69.